

May 30, 2013

**VIA ELECTRONIC DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Room TWA325  
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentations  
CG Docket No. 02-278**

Dear Ms. Dortch:

On Monday, May 28, 2013, Michele C. Farquhar and Mark W. Brennan, counsel to Communication Innovators (“CI”), met with Priscilla Delgado Argeris, legal advisor to Commissioner Rosenworcel, to discuss CI’s pending Petition for Declaratory Ruling (“Petition”) regarding the non-telemarketing use of predictive dialer solutions under the Telephone Consumer Protection Act (“TCPA”). The CI representatives also met with Rebekah Goodheart, Keenan Adamchak, and John Bilyeu from Chairwoman Clyburn’s office on May 29.

As discussed in the attached slides and TCPA outbound calling overview that were distributed at the meeting, the CI representatives encouraged the Commission to grant the CI Petition and confirm that predictive dialer solutions that do not have capacity to store, produce, and dial random or sequential numbers are not automatic telephone dialing systems (“autodialers”) under the Telephone Consumer Protection Act. Today’s predictive dialer solutions promote consumer-friendly calling practices and allow businesses with a legitimate need to contact large numbers of specific customers for particular non-telemarketing purposes to do so accurately, efficiently, and cost-effectively while complying with federal and state consumer protection laws. They connect live representatives with consumers as quickly as possible to provide timely, useful information without using robocalls.

The representatives explained that a grant of the CI Petition is urgently needed because of significant confusion by courts over the Commission’s prior TCPA decisions regarding the applicability of the TCPA to predictive dialer solutions. Specifically, some courts are now interpreting the Commission’s prior TCPA rulings to mean that all predictive dialers are “autodialers” even if they do not meet the statutory definition of an “autodialer.” As a result, companies are being sued in TCPA class actions and are facing potentially devastating penalties just for using predictive dialers or other new technologies. Approximately 500 TCPA cases have already been filed in court this year (nearly double the number of cases filed during the same period a year ago), with many involving allegations of predictive dialer use. The Commission can resolve much of this litigation by

clarifying that a predictive dialer solution that does not meet the statutory requirements of an “autodialer” is not an “autodialer.” To provide meaningful relief, however, the Commission must specifically clarify the scope of the term “autodialer” under the TCPA. For example, clarifying the meaning of “prior express consent” instead of clarifying the term “autodialer” will provide no protection against opportunistic TCPA plaintiffs and will instead encourage further unnecessary litigation and increase costs to consumers, undermining the TCPA’s consumer protection goals.

Pursuant to Section 1.1206(b) of the Commission’s rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

*/s/ Mark W. Brennan*

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# The TCPA and Today's Predictive Dialer Solutions

Communication Innovators

FCC Meeting  
May 29, 2013



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**There is an urgent need for the FCC to protect consumers and clarify that predictive dialer solutions that do not have capacity to store, produce, and dial random or sequential numbers are not “automatic telephone dialing systems” under the Telephone Consumer Protection Act.**

# Overview

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- The World Has Gone Wireless
- Predictive Dialer Solutions – Use Live Representatives and Avoid Robocalls
- Predictive Dialer Solutions Provide Many Significant Consumer Benefits
- Background on the TCPA
- Many Predictive Dialer Solutions Do Not Meet the Statutory Definition for “Autodialers”
- Courts Are Confused by the FCC’s TCPA Decisions
- Solution

# The World Has Gone Wireless

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- There has been a dramatic shift in the use of wireless telephones over the last decade.
- More than one-third (35.8%) of all American homes are wireless-only households.
- Another 15.9% of households receive all or almost all calls on wireless telephones despite also having a landline telephone (“wireless-mostly”).
- Approximately 60% of 25-29 year-olds and 51% of 30-34 year-olds live in wireless-only households (many never had a landline).
- More than half of Americans whose incomes are below the poverty line rely only on wireless services.
- Consumers can easily “port” their landline number to their wireless device.

# Predictive Dialer Solutions – Use Live Representatives and Avoid Robocalls

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- Predictive dialer solutions connect live representatives with consumers.
- They do not place “robocalls.”
- They enable businesses with a legitimate need to contact large numbers of specific customers for particular non-telemarketing purposes to do so accurately and cost-effectively – without relying on robocalls.

# Predictive Dialer Solutions Provide Many Significant Consumer Benefits

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- Predictive dialers are used to place a variety of critical, time-sensitive **non-telemarketing** calls. Examples include:
  - Fraudulent activity / potential identity theft checks
  - Flight delay updates
  - School closing notifications
  - Warnings about utility outages
  - Appointment reminders
  - Lab result discussions
  - Payment confirmations
  - Data security breach notifications
  - Pending insurance lapse courtesy calls
  - Product recalls



# Predictive Dialer Solutions Provide Many Significant Consumer Benefits (cont'd)

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- They promote consumer privacy by protecting against improper calls and manual dialing errors.
- They also facilitate compliance with federal and state calling laws.
- They are exponentially more efficient than manual dialing, increasing productivity and lowering costs for consumers.
- Many of today's solutions are software- or cloud-based application platforms.

# Background on the TCPA

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- Congress enacted the TCPA in 1991 specifically to curb aggressive **telemarketing** practices.
  - Using automatic dialing equipment to make hundreds of thousands of unsolicited calls to random or sequential telephone numbers.
  - Calling sequential telephone numbers in a way that ties up a block of telephone numbers and creates public safety risks.
- The TCPA was not intended to restrict businesses from placing informational and other **non-telemarketing** calls to their customers and accountholders, including on their wireless telephones.

# Background on the TCPA (cont'd)

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- The TCPA defines an “automatic telephone dialing system” (“ATDS”) as “equipment which has the capacity
  - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
  - (B) to dial such numbers.”
- The TCPA restricts calls to wireless telephone numbers when made using an ATDS.

# Many Predictive Dialer Solutions Do Not Meet the Statutory Definition for “Autodialers”

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- **The TCPA does not mention predictive dialer solutions.**
- Today’s leading predictive dialer solutions do not meet the statutory requirements for an ATDS.
- They do not **have the capacity** to store, produce, and dial random or sequential numbers – those features have not been built into the solution.
- Many predictive dialer solutions require callers to create detailed “profiles” for each consumer, and multiple fields (sometimes dozens) must be completed to create a profile.
- Callers cannot simply load telephone numbers into a predictive dialer solution and start placing calls – those call attempts would be rejected.
- Substantial additional changes would be needed to rebuild the solutions to store, produce, and dial random or sequential numbers.

# Many Predictive Dialer Solutions Do Not Meet the Statutory Definition for “Autodialers” (cont’d)

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- Even if they could, companies that use predictive dialers for non-telemarketing purposes have absolutely no need to store, produce, and dial random or sequential numbers (nor can they benefit from using such numbers).
- When used to place **non-telemarketing calls**, predictive dialer solutions do not raise **any** of the concerns expressed by Congress when passing the TCPA in 1991.
- When used for telemarketing calls, the caller is subject to the Commission’s: (1) do-not-call; (2) abandoned call; (3) caller identification; and (4) automated opt-out mechanism requirements. Solutions with the requisite “capacity” would also be subject to: (5) written consent requirements and related disclosures; and (6) the PSAP do-not-call registry requirements.

# Courts Are Confused by the FCC's TCPA Decisions

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- The FCC has previously distinguished between autodialed telemarketing calls and the use of predictive dialer solutions for non-telemarketing calls, consistent with the intent of Congress.
- In the 2003 TCPA Order and 2008 ACA Declaratory Ruling, however, the FCC determined that some predictive dialer solutions qualify as autodialers, creating widespread confusion and devastating class action litigation.
- Approximately 500 TCPA cases have already been filed in court this year (nearly double the number of cases filed during the same period a year ago), with many involving allegations of predictive dialer use.

# Courts Are Confused by the FCC's TCPA Decisions

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- Some courts are now interpreting the FCC's decisions to mean that *every* predictive dialer solution is an ATDS, regardless of whether it meets the statutory requirements.
- **These courts are undermining the FCC's consumer protection goals.**
- The decisions are hindering innovation and deterring companies from placing consumer-friendly, non-telemarketing calls.
- They also may encourage companies to stop using live representatives in favor of prerecorded "robocalls" to save time and money.
- In addition, they are making it impossible for companies to utilize call controls that enhancing consumer privacy and ensure compliance with federal and state law.

# The Solution

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**The Commission should grant the Communication Innovators Petition and confirm that predictive dialer solutions must meet the statutory requirements of an ATDS to be subject to the TCPA's ATDS restriction.**



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## Outbound Calling Under the TCPA Consistent with the Statutory ATDS Definition

Non-Telemarketing, Informational Calls to Wireless Telephone Numbers	
Call Type	Applicable FCC Restrictions
Manual Dialing	<ul style="list-style-type: none"> <li><b><u>Not Restricted by TCPA</u></b> <i>Creates the Potential for Human Dialing Error, Privacy Invasions, and Inadvertent Violations of Federal and State Laws</i></li> </ul>
Predictive Dialers with No “Capacity” to Store, Produce, and Dial Random or Sequential Numbers	<ul style="list-style-type: none"> <li>Not Restricted by the TCPA <i>Eliminates the Potential for Human Dialing Error, Privacy Invasions, and Inadvertent Violations of Federal and State Laws; is an Alternative to Robocalls</i></li> </ul>
Predictive Dialers with “Capacity”	<ul style="list-style-type: none"> <li>ATDS Consent Requirement</li> <li>PSAP Do-Not-Call Registry Requirements</li> </ul>
Automatic Telephone Dialing Systems (“ATDS”)	<ul style="list-style-type: none"> <li>ATDS Consent Requirement</li> <li>PSAP Do-Not-Call Registry Requirements</li> </ul>

Telemarketing Calls to Wireless Telephone Numbers	
Call Type	Applicable FCC Restrictions
Manual Dialing	<ul style="list-style-type: none"> <li>Do-Not-Call Restrictions</li> </ul>
Predictive Dialers with No “Capacity” to Store, Produce, and Dial Random or Sequential Numbers	<ul style="list-style-type: none"> <li>Do-Not-Call Restrictions</li> <li>Abandoned Call Restrictions</li> <li>Caller Identification Requirements</li> <li>Automated Opt-out Mechanism Requirements</li> </ul>
Predictive Dialers with “Capacity”	<ul style="list-style-type: none"> <li>Do-Not-Call Restrictions</li> <li>ATDS “Written Consent” Requirement and Related Disclosures</li> <li>Abandoned Call Restrictions</li> <li>Caller Identification Requirements</li> <li>Automated Opt-out Mechanism Requirements</li> <li>PSAP Do-Not-Call Registry Requirements</li> </ul>
ATDS	<ul style="list-style-type: none"> <li>Do-Not-Call Restrictions</li> <li>ATDS “Written Consent” Requirement and Related Disclosures</li> <li>Abandoned Call Restrictions</li> <li>Caller Identification Requirements</li> <li>Automated Opt-out Mechanism Requirements</li> <li>PSAP Do-Not-Call Registry Requirements</li> </ul>